

Case No. SC95758

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, EX REL. TIVOL PLAZA, INC.,
Appellant,

v.

MISSOURI COMMISSION ON HUMAN RIGHTS, ET AL.,
Respondents.

APPELLANT'S SUBSTITUTE REPLY BRIEF

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I. ARGUMENT

A. The timeliness of a complainant's charge of discrimination is a jurisdictional issue under the MCHR.

Respondent Karen Norton (“Norton”) and Amicus the Kansas City Chapter of the National Employment Lawyer’s Association argue that timeliness is not a jurisdictional requirement for the Missouri Commission on Human Rights (“MCHR”). To support this contention, Norton confounds the subject matter jurisdiction of Missouri’s *courts* and the subject matter jurisdiction of Missouri’s *administrative agencies*. However, Norton’s efforts to expand the MCHR’s subject matter jurisdiction is inconsistent with controlling Missouri law and must be rejected.

For Missouri’s courts, subject matter jurisdiction is governed by the state’s constitution. Specifically, Article V, section 14 provides, “[t]he circuit courts shall have original jurisdiction over all cases and matters, civil and criminal. Such courts may issue and determine original remedial writs and shall sit at time and places within the circuit as determined by the circuit court.” Because of this general and expansive jurisdictional license, “[w]hen a statute speak in jurisdictional terms or can be read in such terms, it is proper to read it as merely setting statutory limits on remedies or elements of claims for relief that courts may grant.” *J.C. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 255 (Mo. banc 2009).

By way of contrast, “[i]n federal courts . . . subject matter jurisdiction is set forth in statutes passed within the authority granted to Congress by Article II of the United States Constitution.” *Id.* “Thus, pursuant to this constitutional authority, Congress has

the power to increase or decrease the kinds and categories of cases heard in the federal courts.” This distinction is important—under controlling Missouri law, an administrative agency also only has “*such jurisdiction or authority as may be granted by the legislature.*” *St. Charles County Ambulance Dist., Inc. v. Missouri Dept. of Health and Senior Services*, 248 S.W.3d 52, 54 (Mo. App. W.D. 2008) (internal citations and quotations omitted) (emphasis supplied). “If the agency lacks statutory authority to consider a matter, it is without subject matter jurisdiction.” *Id.* “Without subject matter jurisdiction, the agency can take no action other than to dismiss the proceeding.” *Id.*

Put differently, like federal courts, Missouri’s administrative agencies are *not* agencies of general jurisdiction and are instead subject to statutory jurisdictional limits. This distinction is fatal to Respondent Norton’s contention that “[t]imeliness is not a jurisdictional issue” for the MCHR.

In pertinent part, RSMo. § 213.075.1 requires any person claiming to be aggrieved by an unlawful discriminatory practice to “make, sign and file with commission a verified complaint in writing, within one hundred eighty days of the alleged act of discrimination[.]” *See also*, 8 C.S.R. 60-2.025(3) (“Any complaint filed under Chapter 213, RSMO *shall* be filed within one hundred eighty (180) days of the alleged unlawful discriminatory practice or its reasonable discovery” (emphasis supplied)). MCHR regulation 8 C.S.R. 60-2.025(7)(B) requires the MCHR to dismiss or close a complaint at any stage for lack of jurisdiction or in the absence of any remedy available to the complainant.

In *Farrow*, this Court made clear that the 180-day filing requirement in § 213.075.1 represented a jurisdictional limitation on the MCHR's authority to issue a right to sue letter:

Hence, the Commission was required to determine its own *jurisdiction* even if it did not make a decision on the merits of Farrow's claims. Had the Commission determined Farrow's claim was untimely, it would lack the authority to issue the right to sue letter. The Commission's only option would be to close the complaint for lack of jurisdiction or the absence of any remedy. The Commission did not close or dismiss Farrow's complaint for *want of jurisdiction*; rather, it exercised its authority to issue the right to sue letter, thus implicitly finding Farrow's claim was timely.

Farrow v. Saint Francis Medical Center, 407 S.W.3d 579, 589 (Mo. banc 2013) (emphasis supplied).

Succinctly stated, when the MCHR receives an untimely charge of discrimination, it lacks subject matter jurisdiction over the charge and must dismiss the same. Norton's efforts to expand the subject matter jurisdiction of administrative agencies to encompass *any* action which could possibly be extrapolated from their statutory *purpose* (*see e.g.*, "to eliminate and prevent discrimination," as provided in 8 C.S.R. 60-1.010.3) must be rejected.

- B. *Farrow* mandates that, at a minimum, the MCHR must complete a jurisdictional analysis before issuing notice of right to sue.

On February 18, 2015, the Cole County Circuit Court entered a final order and judgment of Tivol's Petition for Preliminary and Permanent Writ of Mandamus for failure to state a claim upon which relief may be granted. What makes this appeal unique, is that the judgment appealed from preserved a process for challenging timeliness that appears to be favored by a majority of litigants pursuing (or investigating) claims under the Missouri Human Rights Act, including Tivol. Unfortunately, it also left Tivol in an unenviable trick box. On the one hand, if enforced, the trial court provided Tivol a reasonable and efficient method for resolving the difficult question of whether Norton timely filed her charge of discrimination pursuant to § 213.075.1. On the other, Tivol had no choice but to acknowledge that either the Jackson County Circuit Court or a future appellate court would overturn the judgment and leave Tivol in a position where it was forced to defend against untimely claims of discrimination. This appeal followed.

At its core, this appeal confronts the conflict between the statutory requirements of § 213.111.1 and this Court's holding in *Farrow*. In their briefs, Respondents matter-of-factly assert that the MCHR had no choice but to issue a right to sue letter 180-days after "commencing" its investigation. The appeal of this conclusion is obvious — as interpreted by Respondents, § 213.111.1 abdicates *any* responsibility the MCHR may have for actually "receiv[ing], investigat[ing], initiat[ing], and pass[ing] upon complaints alleging discrimination in employment[.]" See RSMo. § 213.030(7). Based on a strict reading of *Farrow*, however, it appears Respondents' have confounded "completing an

investigation” with “completing a jurisdictional analysis” of a complainant’s charge of discrimination *before* issuing a right to sue letter.

Regardless, at this stage, the parties’ briefing on this point has become redundant. Absent resolution by this Court, the rash of time-consuming, burdensome, and expensive collateral litigation that has emerged in the wake of *Farrow* will persist, whether it be in the form of extraordinary writs or a petitions for judicial review.

II. CONCLUSION

For the foregoing reasons, Tivol respectfully repeats its request that this Court either: (1) find unequivocally that Tivol's defense that Norton's claims are untimely are clearly preserved notwithstanding the language to the contrary in *Farrow*; or (2) reverse the Circuit Court's judgment dismissing Tivol's Petition for Preliminary and Permanent Writ of Mandamus, and remand the case with instructions to the Circuit Court to issue a writ of mandamus compelling the MCHR to vacate the Notice of Right to Sue issued to Norton on June 30, 2014, and demanding that the MCHR determine whether it has jurisdiction over Norton's ambiguous allegations which are not timely filed on their face.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Appellant states that this Appellant's Substitute Reply Brief complies with the provisions of Missouri Supreme Court Rule 84.06(b), in that beginning with the Table of Contents and concluding with the last sentence before the signature block, Appellant's Substitute Reply Brief contains 1,352 words. The word count was generated by Microsoft Word 2010, and complies with the word limitations contained in Rule 84.06(b). This brief complies with Missouri Supreme Court Rule 84.06(a)(6) in that it was prepared using Century Schoolbook size 13 font, which is not smaller than Times New Roman, 13-point font. Furthermore, in compliance with Missouri Supreme Court Rule 84.06(c), Appellant's Substitute Reply Brief has been scanned for viruses, and it is virus-free.

/s/ Nickalaus Seacord
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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2016, the foregoing APPELLANT'S SUBSTITUTE REPLY BRIEF was filed with the Clerk of the Supreme Court of Missouri using the Missouri eFiling System, and service paper copies were sent via U.S. mail, postage prepaid and addressed to the following:

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